STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
SITICIA M. ALBERT,	)	
	)	
Complainant,	)	
	)	
and	)	CHARGE NO: 1997SF0535
	)	EEOC NO: 21B971188
RING CAN CORPORATION,	)	ALS NO: S-10410
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter comes to me on a motion by Respondent, Ring Can Corporation, for summary decision. Complainant, Siticia M. Albert, has filed a response, and Respondent has filed a reply. Respondent has also filed a motion seeking to strike portions of Complainant's affidavit and counter-affidavit supporting her response to the pending motion for summary decision. Complainant has filed a response to this motion. Accordingly, all matters are ripe for a decision.

Contentions of the Parties

In the instant Complaint, Complainant contends that she was the victim of sex discrimination related to her pregnancy when Respondent terminated her from her position as warehouse manager. In its motion for summary decision, Respondent submits that Complainant cannot establish a *prima facie* case of sex discrimination related to her pregnancy, and that in any event Complainant was terminated for reasons unrelated to her pregnancy. Complainant, however, asserts that the instant record contains disputed issues of material fact that preclude the entry of a summary decision.

Findings of Fact

Based on the record in this action, and based upon the standards applicable to motions for summary decision which require that all factual conflicts in the record be viewed in favor of the party opposing the motion for summary decision, I make the following findings of fact:

1. On June 27, 1995, Complainant was hired as a production line worker at Respondent's Decatur, Illinois plant.

2. On July 31, 1995, Complainant was promoted to the position of warehouse manager at Respondent's Decatur, Illinois plant by Jerry Williams, who was the plant manager at the time of Complainant's promotion. In this position, Complainant's initial duties included: (1) ordering cartons and supplies; (2) counting, controlling and reporting inventory; (3) maintaining computerized counts through entering appropriate data into Respondent's system; (4) supervising all of Respondent's forklift drivers at Respondent's Decatur Illinois plant; and (5) maintaining and cleaning the warehouse.

3. Prior to March of 1996, Complainant was sent to Macon, Georgia to receive training in her position as warehouse manager.

4. At some point in March of 1996, Kenneth Landreth took over the plant manager position. As a plant manager, Landreth was Complainant's supervisor. During the month of March, Landreth became aware of a customer who complained that Complainant had ordered 45,000 extra dividers that the customer could not use, thereby resulting in extra labor charges incurred by the customer. Because Complainant was responsible for ordering inventory, Landreth discussed the matter with Complainant.

5. As of April 1, 1996 and for some time prior thereto, Complainant was responsible for taking a monthly inventory and reporting this inventory to corporate headquarters in Tennessee. On April 1, 1996, Complainant faxed seven pages of inventory adjustments to corporate headquarters after inventory had been taken. At that

time Inez Voyles, Respondent's assistant controller, told Landreth that this was the last time she would make Complainant's adjustments after the inventory had been completed. Landreth relayed to Complainant the substance of his conversation with Voyles.

6. On or about April 9, 1996, Landreth became aware that the Decatur plant ran out of "St. Joe Butter-It" sleeves.

7. On April 15, 1996, Landreth became aware that the Decatur plant had run out of resin and thereafter spoke with Complainant about both the resin shortage and the April 9, 1996 shortage of sleeves. At this time, Complainant was responsible for ordering the sleeves and ordering and counting the resin.

8. On April 16, 1996, Landreth met with Complainant to discuss what he perceived to be a mess in the warehouse and Complainant's failure to properly count inventory. Landreth spoke to Complainant about these matters because Complainant was responsible for the condition of the warehouse and supervised individuals who placed the products in the warehouse.

9. On April 17, 1996, Landreth became aware that the Decatur plant had run out of "JN-951 and JN-549" cartons, and that this shortage caused a problem with Archer Daniels Midland Company (ADM), a customer of Respondent. Complainant was responsible for this shortage, and Landreth discussed the situation with Complainant.

10. On April 18, 1996, Landreth became aware that the Decatur plant had run out of "JN-292" cartons, and that this shortage caused a problem for ADM. Complainant was responsible for ordering and maintaining these cartons, and Landreth spoke to Complainant about the problem.

11. On May 1, 1996, Complainant spent some time with Tim Redler, Respondent's production manager at its Rockford, Illinois plant. At that time Redler trained Complainant on the 12-step method of tracking inventory, a program that Redler had devised for proper inventory control. Redler also conducted a second training

session on inventory control with Complainant at some time prior to August 6, 1996. During this session Redler held the belief that Complainant was not following the 12-step program, and thus Redler re-trained her in the program.

12. On May 2, 1996, Complainant told Bob Smith, Respondent's production manager at the Decatur plant, that she was having big problems with the inventory.

13. On or about May 13, 1996, Landreth became aware that the Decatur plant was short of cartons for Quincy Oil, a customer of Respondent. Landreth discussed this shortage with Complainant.

14. At some point in mid-May 1996, Landreth reduced Complainant's responsibilities as warehouse manager to include only purchasing and inventory control. The basis for Landreth's actions was his belief that a reduction in duties would permit Complainant more time to improve in the areas of purchasing and inventory control. Neither Complainant's salary nor benefits were reduced because of this action.

15. On May 22, 1996, Complainant wrote Landreth a note telling him there were problems with the inventory over which she had no control, including "box counts, sleeve counts, resin scrap loss, someone miscounting how much they produce or someone miscounting what is loaded or someone not paying attention to what they are producing or what they are loading." The record is silent as to what response, if any, was given by Landreth to this note.

16. On or about May 30, 1996, Landreth asked Complainant what happened to 6,000 "Clarity" cartons that were supposed to be at the plant but had not been reported on Complainant's inventory count. Complainant did not give Landreth an answer at that time, but thereafter informed Landreth that she had found the cartons on a trailer located at ADM Trucking. At that time Complainant was responsible for inventory counts of the Clarity cartons.

17. In May and June of 1996, Scott Wuerfel, Respondent's vice-president of operations, contacted Landreth about the Decatur plant's excessive inventory variances. At this time and at all times pertinent to this Complaint, Respondent had a $500 inventory variance goal that applied not only to each plant's grand total variance for each month, but also applied to variances on individual items within the inventory. Thus a grand total variance of zero that was obtained by having, for example, $10,000 too much of one item and $10,000 less of another item would not have been viewed by Respondent as acceptable. Landreth discussed the May and June, 1996 variances with Complainant.

18. Beginning in June of 1996, Complainant was told that all carton orders had to be approved by either Landreth or Bob Smith. Complainant retained her responsibilities for ordering supplies other than cartons.

19. On June 6, 1996, Smith became aware that the Decatur plant had run out of slipsheets, which are required for the plant to pack orders. Complainant was responsible for ensuring that the plant had slipsheets in stock, and Smith called to other plants to acquire more slipsheets.

20. At some point in early June, Complainant got married and was given time off for a honeymoon. Complainant had not earned enough vacation by the time she went on her honeymoon, and she was given the time off without pay.

21. On June 19, 1996, Complainant informed Landreth that she was pregnant.

22. At some point in June of 1996 Complainant received a pay raise. This raise was not based on Complainant's job performance, but was given to all of Respondent's employees who qualified for them based on length of service.

23. At some point in June or July of 1996, Complainant attended a manager's meeting during which the topic of inventory variances from Respondent's other plants was discussed. During this meeting, Landreth told Complainant that the Kankakee plant's variance was "a lot" worse than the variances at the Decatur plant, and that as long as

"they" paid attention to the bad variances at the Kankakee plant, "they would shy away from ours". The record is silent as to who Landreth was referring to as "they".

24. At some point in July of 1996, Landreth agreed to give Complainant complete responsibility for ordering cartons.

25. On July 10, 1996, Smith had a conversation with Complainant, during which he expressed the importance of Complainant comparing counts to stock status, box ordering and having correct counts.

26. On July 23, 1996, Landreth met with Complainant about an inaccurate resin count. After this conversation Complainant told Landreth that she had found a row of scrap resin in the warehouse that she had not counted. At the time of this conversation, Complainant was responsible for properly counting inventory.

27. On August 2, 1996, Complainant's inventory report showed that 12,000 Butter-It bottles had been shipped out to a Ft. Worth plant two days earlier. The manager of the Ft. Worth plant called Landreth to ask if the bottles had been shipped, and Landreth told the manager that they had been shipped based upon information contained in the report. Subsequently, Landreth discovered that the bottles were still in the Decatur plant and then called the Ft. Worth manager to correct the information previously given to him.

28. On August 6, 1996, Redler visited the Decatur plant to work with Complainant on Redler's 12-step inventory control program. During this visit Redler determined that Complainant had not been following steps 4, 5, 6, and 7 of the inventory control program, and that her failure to follow step 5 explained why inventory discrepancies carried over from day to day and became worse. At this time Redler held the belief that individuals employed as inventory personnel were responsible for following step 5 and correcting mistakes regardless of whether other employees may have incorrectly ordered products and/or incorrectly counted inventory.

29. On August 6, 1996, Landreth asked Redler after his training session with Complainant whether there was any hope of improvement in Complainant's inventory control skills. Redler told Landreth that there was not any hope for improvement because Complainant was still not following the proper procedures. During this conversation Landreth did not ask for, and Redler did not volunteer, any opinion as to whether Complainant should be terminated.

30. On August 6, 1996, Landreth spoke to Complainant about a variance report. During the conversation, Complainant asked Landreth why Wuerfel did not just go ahead and fire her and "get it over with". Complainant further stated that she could not stand the pressure of her job. Landreth at some point during the conversation told Complainant that the inventory control must improve.

31. On August 6, 1996, Complainant had a discussion with Landreth about an incident she experienced with Steve Vacha, a supervisor, concerning a resin order. During this conversation, Complainant told Landreth that she was becoming ill as a result of the cigarette smoke in and around her office, and that Landreth was placing unreasonable demands on her with regard to the inventory. Landreth then stated that Complainant's illness was just the result of her "emotions". Complainant thereafter gave Landreth a note from her physician stating that she should not be exposed to smoke.

32. At some point after Complainant informed Landreth that she was sensitive to smoke, Landreth told Complainant to post a sign on the door of the shipping office asking that her co-workers refrain from smoking. Complainant placed the sign on the door, but thereafter complained to Landreth that certain people were still smoking. Landreth spoke about Complainant's concerns to these individuals, after which Complainant did not make any further complaints.

33. On August 9, 1996, Landreth discovered that the plant had sent the wrong cartons to a customer and subsequently had a conversation with Complainant about the

matter. During the conversation, Complainant offered to telephone Melinda McKibben in corporate sales about the situation, but Landreth told her not to call McKibben until he had talked to the customer to see what he wanted to do. Landreth thereafter contacted the customer who indicated that he did not want Respondent to take any corrective action. Later on that day, Complainant, who did not hear Landreth tell her not to call McKibben, called McKibben who then contacted Landreth and asked about the situation. At that time, Landreth believed that Complainant had refused to follow his instructions not to call McKibben.

34. On August 11, 1996, Jim Holmes informed Complainant that there was only one bag of glue left in the plant. Complainant had already ordered the glue, but a problem with the supplier prevented the glue from arriving at the Decatur plant. Complainant thereafter called Respondent's Belleville plant, which had ordered a larger than usual amount of glue from the same supplier, and secured from the Belleville plant the needed amount for the Decatur plant. While this incident did not affect the operation of the Decatur plant in any way, Landreth held the belief that Complainant's securing of the required glue from another plant under these circumstances was not an acceptable means of operation since the plant's production could have been shut down.

35. On August 13, 1996, Landreth had become aware that the Decatur plant had run out of JN-241 and JN-950 cartons. Landreth spoke to Complainant about the problem.

36. On August 14, 1996, Landreth decided to terminate Complainant and conducted a meeting with Complainant that was witnessed by Smith. During the meeting, Landreth told Complainant that he was terminating her because of continuing job performance problems. At some point during the meeting Complainant asked Landreth if her pregnancy had been a factor in his decision to terminate her, and Landreth indicated that it was not.

37. In making the decision to terminate Complainant, Landreth held the belief that Complainant was either unwilling or unable to properly order and control inventory in light of his discussions with Complainant in March, April and May of 1996, as well as the presence of similar inventory control problems in July and August of 1996 and in spite of additional training given to her to correct these problems. Specifically, Landreth believed Complainant: (1) did not properly count, order and maintain cartons; (2) failed to properly order supplies for the Decatur plant; (3) failed to control all other inventory; and (4) failed to meet variance goals set by corporate headquarters. Landreth also viewed Complainant's August 9, 1996 telephone call to McKibben as unacceptable conduct because it was in contradiction to his directions. Additionally, Landreth believed that he could not continue to spend between eight and fourteen hours per weekend on inventory functions due to Complainants' inability to properly control inventory.

38. At the time Landreth made his decision to terminate Complainant, Landreth was aware that individuals who were responsible for inventory control at other plants had also not met Respondent's variance goals. Landreth, however, had no knowledge of the overall job performance records of these individuals.

39. The following figures were reported to Respondent's corporate headquarters as variance totals for seven of Respondent's plants:

March 1996		**April 1996**	
Decatur	$4,674.88	Decatur	(-) $1,659.63
Ft. Worth	$131.46	Ft. Worth	$106.43
Kankakee	(-) $2,449.80	Kankakee	(-) $5,120.28
Chattanooga	$12,852.66	Chattanooga	(-) $1,171.67
Stuttgart	$312.11	Stuttgart	(-) $327.33
Macon, Ga.	(-) $3,022.87	Macon, Ga.	(-) $753.17
Sydney	(-) $ 801.14	Sydney	no figures

May 1996		**June 1996**	
Decatur	$7,477.48	Decatur	$3,461.87
Ft. Worth	(-) $222.12	Ft. Worth	$487.27
Kankakee	$514.47	Kankakee	$16,592.87

Chattanooga	(-) $603.44	Chattanooga	$19,405.06
Stuttgart	(-) $567.09	Stuttgart	$1,449.55
Macon, Ga.	(-) $1,853.21	Macon, Ga.	$1,441.02
Sydney	$1,766.62	Sydney	$7,222.72

July 1996		**August 1996**	
Decatur	(-) $5,585.69	Decatur	$257.52
Ft. Worth	(-) 323.66	Ft. Worth	(-)$854.61
Kankakee	$15,338.10	Kankakee	$5,031.35
Chattanooga	(-)$22,195.93	Chattanooga	$14,019.71
Stuttgart	$610.61	Stuttgart	$511.19
Macon, Ga.	$86.15	Macon, Ga.	$15,006.18
Sydney	$5,926.89	Sydney	$6,557.88

40. The following chart lists the number of individual items on which each of the above plants had variances of greater than $500 during the period of May through August 1996:

Plant	**May 1996**	**June 1996**	**July 1996**	**August 1996**
Decatur	32	32	13	32
Ft. Worth	0	1	1	1
Kankakee	19	16	19	12
Chattanooga	6	14	22	24
Stuttgart	2	1	0	0
Macon, Ga.	4	11	11	14
Sidney	8	8	9	27
Belleville	1	4	2	5
Fontana	76	26	29	31

41. In May of 1996 the inventory control duties were removed from the administrative assistant at the Fontana plant. The administrative assistant was not pregnant at the time the duties were removed.

42. In March of 1996 Tim Rehmer was demoted from plant manager to production manager with inventory control responsibilities at the Kankakee plant. Rehmer was terminated in June of 1997. Rehmer was not pregnant at the time these actions were taken.

43. In April 1996, Jeff Elbon, the Chattanooga plant manager, was counseled about job performance problems, including inventories, scrap and poor reporting. Elbon

was terminated in October of 1997, and was not pregnant at the time at either of these actions.

44. From November, 1997 to August of 2000, two employees at the Decatur plant completed maternity leaves and returned to work while two other employees were on maternity leave and were scheduled to return to work.

Conclusions of Law

1. Complainant is an "employee" as that term is defined under the Human Rights Act.

2. Respondent is an "employer" as that term is defined under the Human Rights Act and was subject to the provisions of the Human Rights Act.

3. Complainant established a *prima facie* case of sex discrimination related to her pregnancy.

4. Respondent has articulated a legitimate, non-discriminatory reason for its decision to terminate Complainant.

5. Complainant has failed to present sufficient evidence to create a triable issue on the question of whether Respondent's articulation for its decision to terminate Complainant was a pretext for sex discrimination based on her pregnancy.

Determination

Complainant has failed to present sufficient evidence to create a triable issue on the question of whether Respondent's articulation for its decision to terminate Complainant was a pretext for sex discrimination based on her pregnancy.

Discussion

Preliminary Matter.

Respondent has filed a motion seeking to strike certain allegations contained in Complainant's affidavit and counter-affidavit on the grounds that the affidavits lacked the requisite foundation to establish her personal knowledge as to these allegations.

Complainant argues that said allegations were made either through her own personal observations or through admissions made by Respondent in her Request to Admit Facts or by Respondent's agents. In reviewing the Complainant's affidavits and the Requests to Admit Facts, I agree with Respondent that the affidavits lacked the requisite foundation to establish a source of knowledge as to certain allegations pertaining to alleged statements made by third-parties. Accordingly, because I can consider only competent evidence when deciding a motion for summary decision (see, for example **Watkins v. Schmitt**, 172 Ill.2d 193, 665 N.E.2d 1379, 216 Ill.Dec. 822 (1996)), I will grant the motion to strike as to paragraphs 11, 17, 18 and 19 of Complainant's affidavit, as well as paragraph 20 of Complainant's counter-affidavit.

Respondent also filed a motion to strike Complainant's summary of physical inventory reports submitted by the Decatur plant and other plants on the basis that the summary did not include figures for all of Respondent's plants and reflected only total variance figures and not variances on individual items. However, I agree with Complainant that any alleged shortcomings of Complainant's summary does not preclude its use in the instant motion since Respondent has not argued that the figures supplied by Complainant are inaccurate and Respondent was otherwise free to supply the Commission with an additional summary of facts to support its claim that Complainant's summary is misleading. Indeed, Respondent provided an additional summary that addressed the issue of variances as to individual inventory items. Accordingly, I will deny Respondent's motion to strike Complainant's summary of physical inventory variance reports and consider the summaries provided by both parties.

The merits.

As with all motions for summary decision pending before the Commission, a motion for summary decision shall be granted if the record indicates that there is no genuine issue of material fact, and the moving party is entitled to a recommended order

as a matter of law. (See, section 8-106.1 of the Human Rights Act (775 ILCS 5/8-106.1), and **Bolias and Millard Maintenance Service Company**, 41 Ill. HRC Rep. 3 (1988).) Moreover, in analyzing motions for summary decision, the Commission is required to scrutinize the pleadings, affidavits and exhibits presented to it and to strictly construe them against the party seeking the summary decision so as to have no doubt but that summary decision is proper. (See, **Fourdyce v. Bay View Fish Co.**, 111 Ill.App.3d 76, 443 N.E.2d 790, 792, 66 Ill.Dec. 864, 866 (3rd Dist. 1982).) Furthermore, although there is no requirement that Complainant establish her case to overcome the motion, Complainant is still required to present some factual basis that would arguably entitle her to a judgment under the applicable law. See, **Schoondyke v. Heil, Heil, Smart & Golee, Inc.**, 89 Ill.App.3d 640, 411 N.E.2d 1168, 44 Ill.Dec. 802 (1st Dist., 2nd Div. 1980).

The crux of Respondent's motion for summary judgment is its contention that Complainant cannot establish a *prima facie* case of sex discrimination based on her pregnancy since: (1) as the only inventory control specialist at Respondent's Decatur plant, Complainant cannot show that Landreth gave more favorable treatment to similarly situated employees; and (2) even if Complainant could show that inventory specialists at other plants were having similar difficulties with keeping track of inventory, Landreth, who made the decision to terminate her, was unaware of the details of the alleged performance problems of these individuals so as to make them suitable comparatives in this discrimination claim. Alternatively, Respondent maintains that Complainant presented no evidence of pretext as to its explanation that the real reason for Complainant's termination was her poor job performance.

Initially, Complainant contends that the record contains direct evidence of discrimination in the form of Landreth's failure to address her concerns about smoking in the office as well as his statement indicating that Complainant's "emotions" were the source of her problems at work. The record, though, does not support Complainant's

contentions in this regard. Specifically, Complainant does not dispute in either her initial or counter-affidavit the fact that Landreth spoke to individuals about their smoking in the office, and Complainant did not make any additional complaints about her co-workers smoking in her presence. Under these circumstances, where Complainant has not alleged what additional steps Landreth should have taken, I can not say that Landreth's approach to Complainant's complaints of smoke constituted direct evidence of an anti-pregnancy bias.

Similarly, I do not find that Landreth's observation that Complainant's "emotions" were responsible for her complaints about management placing unreasonable demands on her to control inventory constitutes direct evidence of an anti-pregnancy bias. Specifically, the record lacks a linkage of any sort between Landreth's comment and his decision to terminate Complainant that is required by the Commission to constitute direct evidence of discrimination. (See, for example, **Belha and Modform, Inc.**, ___ Ill. HRC Rep. ___ (1987CF2953, January 31, 1995), where the Commission defined direct evidence as being the sort of evidence, which, if believed by the trier-of-fact, will prove the particular fact in question without reliance upon inference or presumption.) This failure is especially telling in this case where there is no evidence demonstrating that "being emotional" is a trait that is only exhibited by pregnant women. True enough, Landreth uttered the comment within a month from her termination. However, the context of the conversation at the time the statement was uttered did not concern Complainant's employment status, and the comment did not otherwise constitute an admission by Landreth that his decision to terminate Complainant was based on Complainant's pregnancy. (See, **Radue v. Kimberly-Clark Corp.**, 219 F.3d 612 (7th Cir. 2000).) Accordingly, I find that Complainant has failed to present direct evidence of pregnancy-related sex discrimination in this matter.

Complainant's arguments with respect to presenting evidence of discrimination under the indirect method are more substantial. In a case alleging pregnancy-related sex discrimination, the Commission and the courts have applied a three-step analysis to determine whether there has been a violation under the Human Rights Act. (See, for example, **Burke and Catholic Social Service**, ___ Ill. HRC Rep. ___ (1993SF0534, March 20, 1997).) Under this approach, the complainant must first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. Then, the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for the action taken against the complainant. If the respondent is successful in its articulation, the presumption of unlawful discrimination is no longer present in the case (**Texas Department of Community Affairs v. Burdine**, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)), and the complainant is required to prove by a preponderance of the evidence that the respondent's articulated, non-discriminatory reason is a pretext for unlawful discrimination.

As with any case of alleged unequal treatment based upon sex, the elements of a *prima facie* case of discrimination will vary according to the specific claim. Generally, in establishing a *prima facie* case of discrimination under the Human Rights Act, a complainant must show that: (1) she is in a classification protected under the Act; (2) she experienced an adverse employment decision; and (3) similarly situated non-protected class members were not treated in the same fashion. (See, for example, **Burke**, and **Loyola University of Chicago v. Human Rights Commission**, 149 Ill.App.3d 8, 500 N.E.2d 639, 102 Ill. Dec. 746 (1st Dist. 3rd Div. 1986).) Here, Respondent essentially concedes that Complainant has presented sufficient evidence to satisfy the first and second elements of a *prima facie* case of discrimination, but challenges Complainant's contention that similarly situated members outside of her protected classification were treated more favorably.

As to the third prong of the *prima facie* case scenario, Complainant conceded that she had not met Respondent's monthly $500 variance goal, but maintained that her termination based on this failure constituted evidence of pregnancy-related sex discrimination since non-pregnant warehouse managers/inventory specialists responsible for inventory at other plants, who also failed to meet the variance standard, were not terminated. Indeed, as the court in **Loyola** observed, an employer cannot impose different standards of discipline on comparable employees outside of Complainant's protected classification. (500 N.E.2d at 646; 102 Ill.Dec. at 753.) Moreover, the *prima facie* standard is not meant to be an onerous one, and I find that Complainant has presented sufficient evidence to establish a *prima facie* case of pregnancy-related sex discrimination where the record shows that others failed to meet the corporate variance standard and were not terminated and where Complainant was terminated within weeks of informing Landreth of her pregnancy.

However, the fact that Complainant has presented sufficient evidence to establish a *prima facie* case of pregnancy-related sex discrimination does not end the inquiry for purposes of disposition of this summary decision motion, where, as here, Respondent has presented evidence of its rationale for terminating Complainant. In this regard, Respondent contends that Complainant was terminated due to poor work performance which included not only her inability to meet the $500 variance goal, but also the fact that Complainant was having significant problems with ordering and keeping count of inventory. For example, Respondent cites incidents where Complainant: (1) submitted inaccurate figures to the corporate offices and submitted changes after the fact; and (2) Complainant allowed the plant to run out of cartons, resin and other supplies necessary for production.

Moreover, Respondent submits that Complainant's problems with inventory occurred both before and after her June 19, 1996 notice of her pregnancy, and that

Landreth had received reports from Redler that Complainant was not following proper inventory procedures despite having been previously trained to do so. Finally, Respondent contends that Complainant's failure to abide by Landreth's instructions not to call corporate headquarters about an inventory related problem was an additional factor that led to her termination. All of these reasons, on their face, provide me with a neutral, non-discriminatory explanation for Complainant's termination, and I note that Complainant does not seriously contend that these reasons, if believable, would not be sufficient to establish Respondent's burden under **Burdine**.

Thus, the only remaining question in this motion is whether Complainant has put forth some evidence that Respondent's reasons for her termination are "unworthy of belief" and constitute pretext on the basis of her pregnancy. Initially, Complainant contends that Respondent's reliance on her alleged poor work performance is pretextual since Respondent did not document any of her alleged job deficiencies, and, outside of Landreth's discussions about failing to meet the corporate variance goal, she was never "counseled" about any of the matters mentioned by Respondent as being examples of poor job performance. She similarly finds pretext in the fact that she received an hourly wage increase in June of 1996 at a time when Respondent claimed that she was not performing adequately, and in the fact that Respondent's records indicated that individuals responsible for inventory control at other plants were not meeting Respondent's variance goals, but were not terminated.

However, the fact that Respondent did not produce any written documents to corroborate Landreth's allegations of Complainant's poor work performance, by itself, has no legal significance since there is no statutory requirement that an employer create a paper trail before terminating an employee for poor work performance. Moreover, while the absence of such documentation can provide some evidence of pretext where there is an issue as to whether the incident underlying the perception of poor job performance

actually occurred, Complainant did not challenge the existence or the substance of any of the conversations Landreth had with her about her problems with ordering supplies and miscounting existing stock. Thus, while Complainant may quarrel with Respondent's contention that Landreth's conversations with her about her performance short-comings constituted "counselings", the fact remains that Landreth made Complainant aware about her deficiencies in ordering and counting inventory on numerous occasions.

Additionally, I find it significant that Landreth's conversations about various inventory control problems at the Decatur plant took place both before and after Complainant notified him about her pregnancy. Thus this consistent treatment by Landreth negates any inference that Respondent's articulation about Complainants' job performance was contrived to mask a discriminatory intent. (See, for example, **Burke**.) Moreover, Complainant has no answer to the fact that Landreth reduced her job responsibilities in May of 1996 so that she could concentrate on the inventory aspects of her job, or that Redler informed Landreth in August of 1996 about Complainant's problems with utilizing his inventory control program. As such, I find that any lack of documentation with respect to Landreth's concerns about Complainant's job performance cannot be viewed as evidence of pretext under this record.

True enough, Respondent gave Complainant a raise in June of 1996 at a time when Respondent was asserting that Complainant was not doing a good job with the inventory. While I agree that, under certain circumstances, the giving of a raise to an employee whose job performance has been questioned by management can provide some evidence of pretext where job performance formed the basis of the adverse act, I cannot say under this record that Complainant's raise constituted evidence that Respondent actually thought Complainant was doing a good job as a warehouse manager/inventory specialist. This is so, because Complainant failed to submit any evidence that called into question Respondent's explanation that Complainant's raise was

part of a program that provided raises to all of its employees based on tenure and was not based on her performance.

The real rub in this summary decision motion, though, is Respondent's insistence that Complainant cannot provide evidence of pretext based on her contention that similarly situated co-workers received more lenient treatment. Indeed, both parties cite to the Commission case of **Toney and Interventions and Secretaries, Inc.**, 52 Ill. HRC Rep. 376 (1989) as being potentially dispositive on this issue. There, the Commission found that in order for a complainant's co-workers to be truly "similarly situated", the co-workers must have dealt with the same supervisor, must have been subject to the same standards, and must have engaged in the same conduct without the existence of differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. See also, **Vidal and St. Mary's Hospital of East St. Louis, Inc.**, ___ Ill. HRC Rep. ___ (1985SF0343, August 1, 1995) where the Commission additionally observed that comparisons between treatments being given to complainant and her co-workers "must be so similar that [any] distinctions made by the employer are necessarily 'unworthy of belief'". Slip op. at p. 11.

Respondent initially maintains that Complainant cannot present evidence to establish that her alleged comparables are "similarly situated" to her since: (1) Complainant is the only warehouse manager/inventory specialist at Respondent's Decatur plant; and (2) Complainant's unnamed comparables who had similar or worse inventory variance numbers were supervised by other individuals, thereby rendering any comparison between Complainant and said employees invalid for purposes of establishing pretext. Complainant, however, argues that a comparison between herself and individuals performing the same duties at Respondent's other plants is appropriate since: (1) Scott Wuerful from Respondent's corporate office had a role in the decision to terminate Complainant in May and June of 1996 when he spoke to Landreth about the Decatur

plant's inability to meet to the corporate variance goal; (2) Wuerful had a supervisory role over the warehouse managers/inventory specialists at Respondent's other plants; and (3) both Wuerful and Landreth had been aware of the monthly inventory figures for Respondent's other plants at the time of her termination.

Complainant's arguments in this regard, though, are not well taken. Specifically, Complainant has not presented any evidence to establish that Wuerful had any role in the decision to terminate her other than the fact that Wuerfel met with Landreth to discuss the Decatur plant's inventory variance problems approximately two to three months prior to her termination. This fact, though, tells me nothing about Complainant's discrimination claim since she was in no position to say one way or the other what, if anything, Wuerful actually instructed Landreth to do, and Complainant has not otherwise presented any evidence that directly countered Wuerful's express denial of having any role in the decision to terminate Complainant. Indeed, I would note that Complainant failed to provide any foundational details that would establish her source of knowledge as to anything Wuerfel may have told Landreth about her job performance or the status of her employment.

Too, Complainant's desire to establish Wuerful as having a significant role in the termination decision does not particularly advance her case since: (1) there is nothing in the record which showed that Wuerful was actually aware of Complainant's pregnancy at any time prior to her termination; and (2) Wuerful's concerns about the Decatur plant's inventory pre-date Complainant's notice of her pregnancy to Landreth. Accordingly, even if Wuerful had relayed to Landreth what turned out to be an unfair/inaccurate comparison of her job performance in relation to her co-workers at other plants, such a comparison could not have been the product of an anti-pregnancy animosity on the part of Wuerful. But again, Complainant failed to salvage this aspect of her pretext claim since she failed

to present any competent evidence to establish what Wuerful may have told Landreth about the job performances of Complainants' alleged comparable co-workers.

Complainant's attempts to use Tim Redler as a means to establish Landreth's knowledge about the job performances of warehouse managers/inventory specialists from other plants are equally ineffective. Specifically, Complainant asserted in her counter-affidavit that: (1) Redler traveled to all of Respondent's plants to train individuals responsible for the plant's inventory; (2) Redler trained Complainant in his computerized inventory tracking system and expressed his opinion about her job performance to Landreth; and (3) in making his opinion to Landreth, Redler compared her job performance to those of inventory trackers in other plants. Again, the problem with these allegations is that Complainant has not provided either a foundation to show a source of knowledge as to what Redler told Landreth about her job performance, or more importantly, as to what Redler purportedly told Landreth about the job performances of her proffered comparables. As such, Complainant's contentions in this regard can only be viewed as inadmissible speculation.

Throughout her response to the motion for summary decision, Complainant has been laboring under the assumption that her failure to maintain the corporate goal for inventory variances was the sole reason for her termination. Respondent, though, articulated additional reasons for her termination, i.e., Complainant's various mistakes in keeping track of and purchasing inventory, as well as Complainant's decision to call corporate headquarters after being instructed not to do so. These additional reasons for her termination pose a problem for Complainant since, outside of a general denial that she was responsible for these shortcomings, Complainant has presented no evidence as to whether her proposed comparables also had similar deficiencies. (See, for example, **Burke** and **Geier v. Medtronic, Inc.**, 99 F.3d 238 (7th Cir. 1996), where the Commission and the Seventh Circuit similarly observed that valid comparisons for purposes of

establishing pretext require a complainant to show that her comparable co-workers had similar short-comings with respect to all alleged job performance problems attributed to the complainant.) Here, Complainant has not provided me with either specific names or personnel records of her proposed comparables with which to make such a determination.

However, Complainant insists that she should not be required to make such a showing since Judge Church restricted her ability to obtain documents pertaining to the over-all work records of these employees in Orders dated February 3, 1999 and May 5, 1999. A close reading of both Orders, though, does not support Complainant's contention in this regard. Specifically, it is true that Complainant sought the names of individuals who were responsible for tracking inventory at Respondent's plants, and that said request was denied without prejudice in the February 3, 1999 Order on the basis that Complainant failed to make the requisite showing that Landreth had a supervisory role over these individuals. Thereafter, Complainant renewed her motion, but only with respect to seeking documents pertaining to the inventory variances with respect to Respondent's plants, as well as purchase orders made by individuals at these plants. Judge Church granted Complainants' motion in part, directing Respondent to produce documents with respect to the inventory variances due to Wuerful's and Landreth knowledge about said variances, but denied Complainant's request for copies of the purchase orders since there had been no showing that Landreth had been aware of said purchase orders.

Thus, it is clear that Complainant's failure to produce the personnel files in her disparate treatment claim lies with her inability to show how Landreth had any supervisory role over her proposed comparables in Respondent's other plants, or, more important, how Landreth was otherwise aware of their job performances. In this regard then, Complainant's failure to provide such records necessary to establish her disparate treatment claim had nothing to do with any ruling on the part of Judge Church. Accordingly, because Complainant was unable to provide evidence of a suitable

comparative for purposes of establishing pretext, Respondent's motion for summary judgment can be granted on this basis alone. See, for example, **Vidal**, **Goodwin and Sam's Club**, ___ Ill. HRC Rep. ___ (1993SA0560, October 2, 1997), and **White and 3M Company**, ___ Ill. HRC Rep. ___ (1990CF0252, December 22, 1992).[1]

Finally, before leaving the pretext portion of this case, I would note that Complainant makes much of her contention that she was the victim of poor management skills on the part of Landreth and Smith, and that many of the inventory control problems that arose at the Decatur plant stemmed from their inability to properly supervise. She also claimed that some of her subordinates were "lazy" and failed to provide her with accurate counts that resulted in inaccurate figures being reported to Landreth and others. However, even if Complainant is correct in her assessment of the job skills of her supervisors and subordinates, such a fact does not constitute evidence of sex discrimination based on her pregnancy.[2] This is so, since: (1) outside of what the parties have asserted in their affidavits, neither I nor the Commission know particularly one way or the other what it means to be a good or bad warehouse manager/inventory specialist at Respondent's Decatur plant; and (2) the Commission has consistently refused to substitute its judgment for a business decision made by an employer. (See, for example, **Tebrugge and The City of Springfield, Illinois etc.**, ___ Ill. HRC Rep. ___ (1991SF0092, October 17, 1995).) Thus, Complainant's own assessment with respect to her job abilities, by itself, cannot create a triable case on the issue of pretext. Similarly,

[1] While not dispositive on the pretext issue, I note that Complainant's figures with respect to grand total variances do not particularly require a finding of pretext given the fact that the Decatur plant generally experienced a greater number of individual variances than any of Complainants' proposed comparable plants. Moreover, Respondent presented evidence that others who performed poorly in inventory control positions received various forms of disciplines and that other women at the Decatur plant who were pregnant during their tenure were still employed at the Decatur plant.

[2] Indeed, one could argue that the alleged incompetence of Complainant's subordinates reflected on Complainant's own job performance to the extent that she was responsible for their supervision.

Complainant's claim that she failed to hear Landreth instruct her not to contact the corporate office does not provide evidence of pretext since: (1) the relevant inquiry is Landreth's mind-set at the time of the termination decision; and (2) Complainant's contention that she did not hear Landreth's instructions does nothing to discount his perception that Complainant had violated those instructions.

Recommendation

For all of the above reasons, it is recommended that the Complaint and the underlying Charge of Discrimination of Siticia M. Albert be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY:_____

MICHAEL R. ROBINSON
Administrative Law Judge
Administrative Law Section

ENTERED THE 30th DAY OF NOVEMBER, 2001